Mohan Raj ST Patmanathan v Prema Rani a/p Kandiah Ponnampalam & Anor

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8(S4)–33–1138 OF 2001
FAIZA THAMBY CHIK J
9 DECEMBER 2004

Family Law — Children — Custodianship — Factors to be considered — Jurisdiction of court

Family Law — Children — Maintenance — Power of court to direct providence for maintenance of children — Whether property should be held in trust on behalf of daughter

Family law — Divorce — Irretrievable breakdown of marriage — Living apart continuously for two years — Admission of fact by respondent wife that marriage irretrievably broken down but for different reasons — Allegation of adultery — Evidence — Standard of proof — Whether respondent wife had proved adultery — Law Reform (Marriage and Divorce) Act 1976 s 54(1)(d)

The petitioner husband's prayers in his divorce petition were as follows: (a) that the marriage be dissolved on ground that the parties had lived apart since 23 February 1999; (b) joint guardianship in respect of the children; and (c) that the petitioner be appointed the trustee to hold the property held under title HS(D) No Lot 0015124 Daerah Petaling, Mukim Damansara ('the said property') for and on behalf of the daughter, until she is of age and in the meanwhile the rent received shall be utilised to settle the loan sum. The respondent wife admitted that the petitioner had lived apart since 1999 but however alleged that the petitioner had committed adultery.

Held:

(1) The respondent had failed to prove any adultery between the petitioner and the party cited for adultery on the standard of proof beyond reasonable doubt or even on a balance of probability. In this case, there was no evidence of intimacy at all between the petitioner and the party cited for adultery. Therefore, the evidence of adultery fell short of the higher standard required and did not even amount to evidence of any improper association (see para 19).

(2) In the circumstances, the marriage was ordered to be dissolved on ground that the parties had lived apart for a continuous period of at least two years, ie since 23 February 1999 under s 54(1)(d) of the Law Reform (Marriage and Divorce) Act 1976. Decree nisi was made absolute immediately. The ground of adultery was dismissed (see para 37).

(3) Joint legal custody of the children was ordered to the petitioner and the respondent. Daily care and control of the children was ordered to the respondent (see para 37).

(4) The petitioner was to maintain the four children at 25% of his nett income RM4,601.64 which amount to RM1,150.41. However since the petitioner volunteered to give RM2,500 per month the court ordered accordingly plus paying normal education, medical and dental expenses to be paid forthwith on production of official receipts (see para 37).

(5) The said property was to be held by the petitioner on trust for the daughter until the loan is fully repaid and it was ordered the rent received shall be utilised to settle the said loan sum and once fully repaid and settled the said house is to be held by the petitioner and the respondent on trust for the daughter until she attains the age of 21 years (see para 37).

[**Bahasa Malaysia summary**

Tuntutan suami pempetisyen dalam petisyen penceraiannya adalah seperti berikut: (a) bahawa perkahwinan dibubarkan atas sebab kedua-dua pihak sudah tinggal berasingan sejak 23 Februari 1999; (b) penjagaan bersama anak-anak mereka; dan (c) pempetisyen dilantik sebagai pemegang amanah kepada harta HS(D) No Lot 0015124 Daerah Petaling, Mukim Damansara ('harta tersebut') untuk dan bagi pihak anak perempuan mereka, sehingga dia cukup usia dan untuk sementara waktu menggunakan sewa yang diterima untuk menyempurnakan jumlah hutang. Isteri responden mengaku bahawa pempetisyen telah tinggal berasingan sejak 1999 tetapi mengatakan bahawa pempetisyen telah melakukan hubungan zina.

Diputuskan:

(1) Responden gagal membuktikan sebarang hubungan zina di antara pempetisyen dan pihak yang dirujuk untuk hubungan zina itu dibuktikan atas tahap pembuktian tanpa keraguan ataupun atas imbangan kebarangkalian. Dalam kes ini, tiada keterangan untuk hubungan intim langsung di antara pempetisyen dan pihak yang dirujuk itu. Oleh itu, keterangan untuk hubungan zina itu tidak memenuhi tahap pembuktian dan mahupun berjumlah kepada hubungan yang tidak wajar (lihat perenggan 19).

(2) Dalam keadaan ini, perkahwinan diperintahkan di bubarkan atas sebab bahawa kedua dua pihak telah tinggal berasingan untuk tempoh berturut-turut tidak kurang daripada dua tahun, iaitu sejak 23 Februari 1999 di bawah s 54(1)(d) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976. Dekri Nisi menjadi mutlak pada masa itu. Perkara hubungan zina ditolak (lihat perenggan 37).

(3) Penjagaan bersama anak-anak mereka diberi kepada pempetisyen dan responden. Penjagaan harian dan kawalan anak-anak diberi kepada responden (lihat perenggan 37).

(4) Pempetisyen diperintah menyokong empat orang anaknya pada 25% pendapatan RM4,601.64 yang berjumlah RM1,150.41. Akan tetapi

pempetisyeen secara sukarela memberi sebanyak RM2,500 sebulan, mahkamah memerintah duit tambah pembayaran untuk pendidikan biasa, perbelanjaan perubatan dan pergigian dibayar dengan penyerahan resit-resit rasmi (lihat perenggan 37).

(5) Harta tersebut di perintahkan dipegang oleh pempetisyen atas amanah untuk anak perempuannya sehingga hutang di bayar dengan penuh dan juga diperintahkan menggunakan sewa daripada harta tersebut untuk menjelaskan hutang dan apabila hutang dijelaskan dengan penuh, harta tersebut dipegang oleh pempetisyen atas amanah untuk anak perempuannya sehingga dia mencapai usia 21 tahun (lihat perenggan 37).]

Notes

For cases on custodianship of children, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2727–2837.
For cases on divorce generally, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2888–3111.
For cases on maintenance, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2693–2704.

Cases referred to

Aik Meng (M) Sdn Bhd & Ors v Chang Ching Chuen [1995] 2 MLJ 770 (refd)
Bastable v Bastable [1968] 1 WLR 1684 (refd)
Kang Ka Heng v Ng Mooi Tee & Anor [2001] 3 MLJ 331 (refd)
KO (an infant), Re [1990] 1 MLJ 494 (refd)
Leong Sam Moy v Low Chee Thiam [1997] 2 CLJ Supp 212 (refd)
Serio v Serio [1983] 4 FLR 756 (refd)

Legislation referred to

Evidence Act 1950 ss 59, 73A(1)(b)
Law Reform (Marriage & Divorce) Act 1976 ss 53, (2), 54, 1(a), (b), (c), (d)

YN Foo (YN Foo & Partners) for the husband petitioner.
R Kandiah (Mohd Latip & Associates) for the respondent wife.
Rita Phuah (Lai, Yoong & Rita) for the party cited.

Faiza Thamby Chik J:

[1] The petitioner husband's prayers in his divorce petition are as follows:

(a) Marriage be dissolved on ground that the parties have lived apart since 23 February 1999;

(b) Each party to bear its own costs;

(c) Joint guardianship and 'tanggungan' in respect of the children;

(d) Petitioner husband be appointed the trustee to hold the property held under title HS(D) No Lot 0015124 Daerah Petaling, Mukim

Damansara for and on behalf of the daughter, Kamalinni a/p Mohan Raj until she is of age and in the meanwhile the rent received shall be utilised to settle the loan sum; and

(e) Such further and other relief as the court deems fit and reasonable.

[2] The respondent wife in her answer:

(i) Admitted that the husband has lived apart since January 1999;

(ii) Further admitted that the husband had left the respondent in 1999 and lived separately save that the husband came back in the morning to send the children to school and every evening the husband returned to see the children and is there from 6pm to 8pm;

(iii) Admits that the marriage has irretrievably broken down but that he has committed adultery with the party cited at the premises of the party cited at No 5–9–2 Vista Angkasa, Jalan Bukit Kerinchi, 59100 Kuala Lumpur.

[3] In her cross-petition, in support of her allegation of adultery the respondent wife pleaded as follows:

(a) Since 1996 the husband had a relationship with the party cited;

(b) When the wife's father died on 11 December 2001 the husband took the opportunity to send the wife and the four children to Klang to the father-in-law's house. Husband also transferred the schools of all the children from Kuala Lumpur to Klang;

(c) To confirm the adultery the wife contacted Setiawan Security Sdn Bhd to investigate the matter. Now there is evidence that the husband has a relationship with the party cited on 13 to 18 May 2003 at the premises 5–9–2 Vista Angkasa, Jalan Bukit Kerinchi, 59100 Kuala Lumpur or at any other time when the husband had the opportunity. The report of the investigation will be presented at the trial;

(d) The wife was not aware of the adultery between the husband and the party cited and continued with her household responsibilities until the divorce petition was served on the wife by the solicitors for the husband.

[4] The wife has prayed for the following:

(a) Damages from the husband and party cited;

(b) Marriage be dissolved on the grounds of adultery with party cited;

(c) Maintenance of RM4,405 per month for the wife and the children;

(d) Custody of the children to the wife with reasonable access to the husband.

[5] Additional prayers in the wife's answer to the husband's reply:

(a) Custody, care and control of the children to the wife;

(b) The wife be appointed as trustee of the Shah Alam house until daughter reaches full age and that rental be used to settle the loan;

(c) Attachment of salary of Husband to pay the maintenance, and

(d) 5% increase annually on the previous years maintenance;

(e) loss of income by the wife of RM191,125 being her resignation as computer programmer from 1989 to July 2002 and as a housewife;

(f) refund of loan from wife's brother or wife be given one of the two cars, Toyota Unser (BAF 2626) or Proton Perdana (WLE 5959).

[6] The sole ground for divorce under s 53 of the Law Reform (Marriage & Divorce) Act 1976 ('LRA') is that the marriage has irretrievably broken down. Section 54 of the LRA enjoins the court (to enquire so far as it reasonably can) to have regard to one or more of the four (4) facts alleged as causing or leading to the breakdown of the marriage, namely, adultery (s 54(1)(a)), unreasonable behaviour (s 54(1)(b)), desertion (s 54(1)(c)) and living apart for at least two years (s 54(1)(d)). If circumstances make it just and unreasonable, the court shall make a decree for its dissolution (s 53(2) LRA). It is observed that on the facts of the present case, both the petitioner husband and the respondent wife admitted the marriage has irretrievably broken down. The petitioner husband's petition states that the marriage has irretrievably broken down and relied on the fact that the parties had lived apart since 23 February 1999. The respondent wife's answer admits that the marriage has irretrievably broken down and admits that the petitioner husband had lived apart since January 1999. Only that she relies on the alleged adultery with the party cited at No 5–9–2 Vista Angkasa, Jalan Bukit Kerinchi, Kuala Lumpur. The respondent wife's only contention in her answer was specifically that the petitioner husband came back to the Bangsar house (where she was staying with the children) in the morning to take the children to school and in the evenings he would be there from 6pm to 8pm. In other words, the wife did not deny that they had lived separate and apart but only that he came back to see his children and even by her own admission only from 6pm to 8 pm.

[7] The petitioner husband in his reply to the respondent's second amended answer and cross petition stated quite categorically:

(i) At the time of the issuance of the certificate the petitioner and the respondent were still living at the Bangsar house but had stopped sleeping in the same bedroom since late 1995;

(ii) Although the petitioner had moved out of the Bangsar house on 23 February 1999, his mother continued to live there as it

was her house. For the sake of maintaining a relationship with his children and also to see his mother the petitioner returned to the Bangsar house every morning to pick and send the children to school. The petitioner would then return in the evening after work to spend time with the children and his mother;

(iii) The petitioner never spent a single night at the Bangsar house after 23 Febraury 1999. Occasionally, the petitioner's mother would insist that he stay for dinner that she had prepared. The petitioner would usually leave the Bangsar home by 9pm each night.

[8] In the petitioner husband's evidence in chief (see exh P1, petitioner husband's witness statement), he repeated the aforesaid in his answers to questions 6, 7, 9, 10 and 12. Even in the cross-examination by the respondent's wife counsel, the petitioner husband stated:

(i) That he left the Bangsar house (his mother's house) so that his children could remain in the Bangsar house and he could see them regularly;

(ii) That it was the respondent wife who moved herself and the children out to live in Klang, and demanded the petitioner husband seek Mrs Gurusamy's help to transfer the children to school in Klang;

(iii) In his cross-examination that he came to the Bangsar house at 6.15am, woke the children, gave them breakfast and took them to school before 7am. Perusing the evidence I do not believe the petitioner husband changing into shorts and lying in bed with the respondent wife till 6.40am. If indeed the petitioner husband wanted to do this, there was no reason to move out. This is because even by the respondent wife's own evidence-in-chief (all her witness statements from R12, R13, R14, R15, R16, R17 and R18), she contends the marriage was fraught with difficulties throughout, *inter alia*:

(a) she, the respondent wife was not interested in the marriage (Item 3, R12);

(b) the petitioner husband was the one in love with her and wanted to marry her (Item 3.9, R12);

(c) husband's mother insisted on a big dowry (Item 3.9, R12);

(d) husband's sisters were difficult (Item 2, R13);

(e) husband's relatives, including aunts, were difficult (Item 3, Rl3);

(f) husband accused her of looking at other men (Item 4, Rl3)'

(g) wife's brothers were against the marriage from the very beginning (Item 7, R12);

(h) husband's family was the cause of the problems (Item 5, Rl3);

(i) husband's mother constantly interfering and finding fault with her (Item 4, R13);

(j) husband's sister wanted her out of the Bangsar house (Item 3, R15).

[9] I think the aforesaid allegations (although disputed by the petitioner husband) merely confirms that even by the respondent wife's own account the marriage had irretrievably broken down way before the petitioner husband left to live apart in January/February 1999. As to the diary, I rule that the document remained ID9, ie it was not proven and therefore not admissible.

[10] In her cross-petition the wife prayed for a divorce on grounds that the petitioner had an adulterous relationship with the party cited and prayed for damages. In her answer the party cited has denied any adulterous relationship and stated that she and the petitioner has been friends since 1987 and she also was aware of the petitioner having marital problems. Evidence led by the wife on the alleged adultery are in: (a) four letters dated November 1989 to January 1990, (b) private investigator's report. I have read and scrutinized the four love letters carefully and I found that those love letters show intensity of feelings only and was an expression of his feelings, reaching out to a friend and the party cited's reply was that she could offer him friendship and nothing more, more like an advice from an elder sister to a younger brother; it showed a one way emotional exchange that was not reciprocated. There is no evidence of intimacy at all. In the letter dated 28 November 1989, the petitioner said, 'because if it does happen it will be very shameful for us and nobody will respect us anymore'. In the letter dated 3 February 1990 the petitioner said, 'It is very important that we do not create scandal and hurt our families. Because if we do then we will forever live in shame and humiliation… You should stay and take care of him like I said earlier you must do your duty to him'. There was no physical contact and expressions in those letters which were purely emotional. Even in the letter dated 28 November 1989, the petitioner wrote to the party cited, 'Since you do love him, give in to his physical and mental needs and do it willingly…'. It is noted that the party cited testified that she had told him (the petitioner) that she like him a lot but that it would be wrong for them to like each other as they were married with children and being Ceylonese their community will ostracise them. I am of the view that in any event despite the four letters which were written between November 1989 to January 1990 when the party cited was in the United Kingdom supporting her husband, the petitioner remained very much in the marriage and had three children thereafter with the respondent, namely:

(i) Premh born 2 June 1990;

(ii) Navenh born 7 September 1994; and

(iii) Kavinenh born 24 April 1996

[11] This clearly showed that the petitioner had worked at his marriage with the respondent.

[12] In respect of the private investigator's report, his evidence is marked R2 (hereafter P1), the respondent claimed that P1 was a licensed investigator. However not only was there no proof that the private investigator was licensed but his entire credibility has been challenged. A letter from Setiawan Security Sdn Bhd (exh P27) showed that since 2000 until the date of that letter 16 October 2003 the company did not receive any contract for investigation by him and that his contract has been terminated. And the licence shown on the company letterhead belongs to the company and not to any individual. It is hereby noted that this evidence of P27 has not been rebutted by the respondent's counsel. As regards the private investigator's report surveillance was purportedly conducted on 13 May 2003 to 19 May 2003.

REGARDING REPORT 13 MAY 2003 – 14 MAY2003

(a) Evidence in P1 Report

[13] In the report (R7, p 24), the evidence by the private investigator was that both the petitioner husband and the party cited had come to the apartment at 8.30pm. on the night of 13 May 2003. The private investigator had then called off the surveillance at 0001 (ie 12.01 midnight). The following morning ie 14 May 2003, the report states both the petitioner husband and the party cited was seen coming out together from her apartment and both seen travelling to Kanna Curry House for breakfast together. The implication from the report was they had spent the night together.

(i) In the witness box the P1 said:

I called off the surveillance at 0001 am. They did not come out. I suspected that they spent the night together.

(ii) Rebuttal evidence by Cik Lailatul (PW3)

On 13 May 2003 I was at the party cited's house. I joined Mohan, Mahes and her children and her mother for dinner. After dinner, I gave Mohan a lift back to his house after 11pm. Cik Lailatul's abovesaid evidence clearly rebuts the evidence of the P1 that the petitioner husband had spent the night at the party cited's house. This evidence was not challenged in cross-examination by the respondent wife's counsel.

(iii) P1's response to above when Cik Lailatul's evidence was put to him in cross-examination

P1 said his report was only on the target and if target left in another car it was possible that he may not have seen him. The fact is even by the P1's report, they (the investigators) only returned to the apartment and took their position the following morning at 7.30am and allegedly saw the party cited and the petitioner husband come out of the apartment at 9am. The photographs referred to by the respondent wife's counsel were

never properly tendered and admitted and were only marked ID19. The photographs in any event, if at all, purport to show them at Kanna Curry House. In any event the respondent wife's contention that the petitioner had spent the night at the party cited's apartment on 13 May 2003 was never put to the petitioner by the wife's counsel and accordingly no imputation can be made that he had done so (see *Civil Trial Advocacy* by Gurdial Singh, Nijar Singh citing Gopal Sri Ram JCA in *Aik Meng (M) Sdn Bhd & Ors v Chang Ching Chuen* [1995] 2 MLJ 770).

17 MAY 2003 AND 18 MAY 2003 — CONCLUSIVELY REBUTTED BY THE EVIDENCE IN THE BANK NEGARA BORANG KEMUDAHAN PERUBAHAN SLIP (P25) POLICE REPORT DATED 18 MAY 2003 (P26) AND REBUTTAL EVIDENCE OF CIK LAILATUL (PW3)

(b) Evidence in P1 Report

[14] The report stated that the petitioner husband and the party cited had come back to the apartment at 3.25pm. on 17 May 2003 and, as there was no movement, he called off the surveillance at 2359 hours, ie 11.59 pm. On 18 May 2003 the P1 Report stated that both the petitioner husband and the party cited came down from her apartment at 9.05am and were seen talking with one Malay female and the three of them went into the car and left towards the University Hospital. The implication again was they had spent the night together.

(c) Rebuttal Evidence

(i) Even by the P1's own account the fact is that he called off the surveillance at 11.59pm on 17 May 2003 and this cannot be proof that the petitioner husband must have spent the night at the apartment.

(ii) Cik Lailatul (PW3) testified that on 18 May 2003 (the following morning), she had picked the petitioner husband from his home in Bangsar and met up with the party cited at the party cited's apartment and they then went for breakfast. This was not challenged by the respondent wife's counsel. This conclusively proves that the petitioner did not spend the night of 17 May 2003 at the party cited's house.

(iii) The private investigator's response when challenged with the above rebuttal evidence:

> One of my men was in the compound and one was at the gate. My man did not tell me whether the Malay lady arrived at the apartment.

Clearly, they did not notice the arrival of Cik Lailatul although even in their own report they confirmed (at R7, p 26) seeing her at the apartment with the petitioner husband and the party cited and leaving together towards the University Hospital.

(iii) The Bank Negara Borang Kemudahan Perubatan (P25) and Police Report (P26) confirmed the petitioner husband had been knocked down on the 17 May 2003 by a motorcycle with intention to hurt him (despite no other traffic in the vicinity) and sustained injuries. The respondent wife's counsel's contention that he was not prescribed painkillers does not mean he was not and could not be in pain and hence had never left the Bangsar house that day. If he could not be prescribed painkillers and tranquilizers he was in even greater pain and could not go anywhere on the first day including making the police report on the day it happened. He only lodged the police report the next day, ie on 18 April 2003.

(iv) Police report of petitioner husband on 18 May 2003 at 3.03pm.

The fact is the police report of being deliberately knocked down by a motorcycle was lodged by the petitioner husband the next day because he was injured and in no state to have been at the party cited's apartment.

Also the petitioner husband's contention that he was exercising access on 18 May 2003 was confirmed by the testimony of the respondent wife in the cross-examination of her which is as follows:

Q: With regard to the children, is it correct that for 2002 to 2003 the petitioner had access to the children every weekend from 10am to 6pm on Saturday and Sunday?

A: Yes.

Q: He would faithfully come every week?

A: Yes.

The four children went out with him for access every Saturday and Sunday at the time and the petitioner husband brings the children to Bangsar. The respondent wife confirmed the eldest daughter stopped seeing him at the end of December 2002, the eldest son from June 2003 and younger two sons from October 2003, Thereafter:

Q: Now the petitioner goes every weekend to the house and talks to your children over the gate?

A: Yes.

Q: Faithfully every weekend?

A: Yes.

The fact is both the police report (exh P26) and confirmed by the wife's testimony, the allegation that the petitioner husband went to the apartment at 1535 hours (as stated in the private investigator's report) is refuted and hence rebutted. At the time the petitioner husband still was able to exercise his access to three of his children outside of Klang. He could therefore have made his police report at 3.03pm. and exercised access at the same time when he had them brought back to Bangsar.

(vi) Further the respondent wife's counsel never put to the petitioner husband that he went to the party cited's apartment on 18 May 2003 and hence no imputation can be made.

(vii) In any event, by the private investigator's report the petitioner husband left the apartment and returned to Bangsar at 2050 hours (8.50pm) on the night of 18 May 2003.

(viii) Last but not least, the private investigator stated that in their surveillance they took position in the compound only and never on the level of the apartment except once when he specifically testified that he checked at the 12th floor and it was closed. But the party cCited lives on the ninth floor.

OTHER EVIDENCE RAISED IN THE RESPONDENT WIFE'S SUBMISSIONS

[15] Cik Lailatul had testified that the party cited's children and mother are at the apartment. Party cited also testified that she has university students staying with her.

[16] Alleged overdose incident — this incident arose as a consequence of the reason for the postponement of the first divorce petition filed by the petitioner husband and the reason for it being struck out. It has no bearing to the present petition.

[17] The evidence of Jeyamani Ramasamy was also rightly rejected because the respondent wife's counsel never put to the petitioner husband that he did not stay in Cheras. Hence, not having challenged in cross-examination the petitioner husband's evidence, I reject the respondent wife's counsel's attempt to call for further evidence.

THE DEPUTY DIRECTOR OF HUMAN RESOURCES FROM BANK NEGARA, TUNKU ZAID RAIA AHMAD (RW3)

[18] The aforesaid witness said he was never told what documents were needed from him and hence when asked whether he could confirm receiving the letter at p 28 Ikatan Dokumen Pempetisyen 1 (P2) by the petitioner husband notifying the bank of his change of address, he said he was unable to do so for that reason only and not that such a document confirming change of address was never received.

[19] I therefore come to the conclusion that the private investigator's report admittedly is flawed. P1 said he called the surveillance off at midnight on 13 May 2003 as he suspected that they had spent the night together. Although Lailatul said that she left with the Petitioner at 11pm. that night and even though the P1 would not have known if the petitioner had left in another car that night. The private investigator admitted that it was his suspicion that the petitioner stayed over at the apartment on 13 May 2003. The P1 report on 14 May 2003 stated that they took position in the compound. They were

never on the level of the apartment. However, P1 admitted that if petitioner had left he would not have known either. Lailatul testified that she had dropped the petitioner off at his home in Bangsar after 11pm. on 13 May 2003 and this was not challenged. Whether the petitioner had stayed overnight on 13 May 2003 at party cited's apartment was not even put to the petitioner by the wife's counsel. Lailatul's evidence is intact and it was never challenged. P1's evidence has been challenged, and therefore it is not reliable and unworthy. P1's contention that on 17 May 2003 the petitioner was seen at the party cited's apartment at 3.35pm. This evidence has been challenged as petitioner was in fact in a hit and run accident on that day. (See exhs P25 and P26, police report medical attendance approval). Lailatul testified that she had dinner with party cited at her apartment on 17 May 2003 that on 18 May 2003 she had picked up petitioner and together they went to pick party cited for breakfast. The respondent in cross-examination confirmed that the petitioner from 2002 to 2003 had not failed to exercise his right for access to the children on Sundays. It was never put to the petitioner that he was at the party cited's apartment on 18 May 2003 (Sunday). Timing of the police report must be accepted as correct. Party cited testified that her children are typical teenagers and generally does not talk much. I think that the statement must be accepted as it was said and cannot be speculated that just because the children do not talk they were not there in the apartment. As testified by the party cited the children are always in the apartment doing their own activities. In this case there is no evidence of intimacy at all between the petitioner and the respondent and the evidence of adultery falls short of the higher standard required and does not even amount to evidence of any improper association. Rayden on Divorce stated, 'The burden of proof is throughout on the person alleging adultery, there being a presumption of innocence'. In *Bastable v Bastable* [1968] 1 WLR 1684, Wilmer J said:

> True it is not a criminal offence; it is a matrimonial offence. It is for the husband petitioner to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows in my view that a high standard of proof is required in order to satisfy the court that the offence has been committed.

[20] *Re KO (an infant)* [1990] 1 MLJ 494 affirmed *Bastable*. In *Kang Ka Heng v Ng Mooi Tee & Anor* [2001] 3 MLJ 331 VT Singham JC (as he was then) held:

> It is settled law that an allegation of adultery must be proved to the satisfaction of the court beyond reasonable doubt.

[21] And quoting Wilmer LJ in *Bastable*:

> It is for the husband petitioner to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows,

in my view, that a high standard of proof is required in order to satisfy the court that the offence has been committed.'

[22] In *Serio v Serio* [1983] 4 FLR 756, the Court of Appeal held 'balance of probability is such degree of probability as is commensurate with the gravity of the issues involved.'

[23] In the present case on the evidence the wife has failed to prove any adultery between the husband and party cited whether on the standard of proof beyond reasonable doubt or even on a balance of probability for the following reasons:

(i) The four letters between November 1989 to February 1990 do not prove any adultery or that it had even caused the breakdown of their marriage, since the wife and husband went on to have three more children and lived together until January/February 1999;

(iv) The private investigator's surveillance has failed to prove that the husband and the party cited has committed any adultery for the following reasons:

(a) the surveillance report on 13 May 2003, 14 May 2003 and 18 May 2003 has been conclusively rebutted by the evidence of Cik Lailatul that no adultery could possibly have been committed;

(b) in the P1's own words he merely suspected that they had spent the night together;

(c) the accuracy of the P1's report has been challenged by the evidence of exhs P25 and P26, ie Bank Negara medical request form and the police report showing that the husband was not even in the vicinity of the party cited's apartment on 17 May 2003 and 18 May 2003 by reason of his accident and P24, ie the Bank Negara staff report on clock out time which showed that party cited could not have arrived back at her apartment on 13 May 2003 at the time stated in the P1's report (admitted by P1 that it could have been a mistake).

(d) The veracity of the P1 has been challenged by the evidence of exh P27 being a letter from the alleged employer Setiawan Security Sdn Bhd stating categorically that the company had never received any contract for investigation since the P1's appointment from year 2000 (ie company has no knowledge of present so-called surveillance) and that his contract had in fact been terminated and he therefore had no authority and was not licensed to conduct the surveillance using Setiawan's KDN Licence No 3983/3984.

[24] As to the party cited's husband not testifying: If the respondent wife wished to rely on evidence from the party cited's husband the duty and hence

A the onus and burden of calling him and getting him to testify is entirely on the respondent wife. She (the respondent wife) must bear the consequence of his refusal and not the party cited. In any event, the party cited's husband was in court during the trial, hence the petitioner objection to him testifying.

B **[25]** As to loan for Rampai Court: The petitioner husband testified that he had agreed to give the loan to the party cited as the father of the party cited was agreeable to pay him interest at 10% ie above market rate. The party cited also provided clear evidence that her ex-husband was full aware of the loan for the purchase of Rampai Court and also had in fact declared the rental received from Rampai Court in their joint tax submissions (exh PC 29 p 1–3).

C **[26]** As to Astro bill: The presence of the party cited's Astro bill in the Petitioner's car most certainly cannot be evidence that he paid for her bill. Even the evidence in the Ikatan Dokumen Responden R7 shows two separate accounts, ie R7 at p 30 refers to the party cited's account and R7 at p 31 is the petitioner husband's account.

D **[27]** As regards the children: Care and control of the four children to the respondent wife is not in dispute. The husband only seeks joint guardianship, ie joint legal custody of them. Despite the Interim Order dated 25 September 2002 by the court granting the husband reasonable access to the four children and in addition to access every Sunday from 10am to 6pm and first half of all school holidays, initially the husband had access even on weekends and overnight during school holidays and talked to them on the telephone everyday. But it is noted that the husband has been completely denied access to the children, namely:

E

F
(a) Daughter stopped since March 2003;
(b) Eldest son stopped since July 2003;
(c) Two youngest sons stopped since November 2003;
(d) All telephone access ceased since January 2004.

G **[28]** It is seen that despite the obstacles created by the wife and the children being used to demand unreasonable terms set by the wife before the children would come for access to the husband, the husband still persists in going to Klang to see them, standing outside the gate and talking to them over the gate every Sunday. I must stress here that on this point, see *Leong Sam Moy v Low Chee Thiam* [1997] 2 CLJ Supp 212 and Rayden on Divorce (124th Ed) which

H states:

> It has been said that access should be regarded as a basic right of the child rather than basic right of the parent, and save in exceptional circumstances to deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long term.

I **[29]** The wife even in her answer has agreed to reasonable access of the children to the husband.

[30] As to maintenance the wife has applied for RM4,405 per month for her and the children. It is noted that the husband has been very responsible and voluntarily been giving RM2,500 per month and extras when the need arose. The husband has a nett income of RM4,601.64 (see exht P4, Bank Negara pay slip). This has been confirmed by the deputy director of Human Resources, Bank Negara, Tunku Zaid (RW3). Whilst the husband's gross income is RM11,472 and RM2,722 (car allowance because of his seniority level with Bank Negara), however the following are compulsory deductions which are deducted at source by the bank:

(a)	EPF	RM1,562.00
(b)	Car (Toyota)	RM 986.89
(c)	Car (Proton Perdana)	RM1.591.66
(d)	Housing loan	RM 744.81
(e)	Senior Officer Lunch	RM 40.00
(f)	Income tax deduction	RM3,100.00
(g)	Persatuan BN	RM 1.00
	Total deduction	RM9.592.36
	Nett income	RM4,601.64

[31] As regards the two cars the Toyota Unser was purchased to enable the husband to travel around with the four children and the family cats. The Proton Perdana was necessary because as a senior Bank Negara officer he could not be seen driving in a van to meet clients. This was confirmed by Tunku Zaid (RW3). Both cars are still under loan from Bank Negara and the husband has testified that the cars cannot be sold or transferred until the loans are fully repaid to Bank Negara. The two cars although registered in the husband's name but the Bank Negara's title to them has been indorsed. The wife has a car of her own, a Proton Wira Aeroback. As regards the car allowance of RM2,722, under the practice in Bank Negara this allowance is given to all senior officers of Bank Negara as a fixed allowance which they have to use in full to pay for all expenses in maintaining the car at EON and the loan.

[32] As regards the Koperasi loan, this was taken to pay the mother's medical bills and legal costs of this suit.

[33] As regards the housing loan, this was taken to enable the husband to purchase the Shah Alam house which both have agreed to hold on trust for the daughter. Therefore it is clear that as the above deductions are compulsory the husband's available income is only RM4,601.64 of which he had been paying RM2,500 every month to the wife and children which amounts to 54% of his available income. In normal circumstances the court would award 25% of his gross income which would amount to RM2,868.

[34] As regards the Shah Alam House held under HS(D) No Lot 0015124 Daerah Petaling Mukim Damansara, both agreed that it is to be held on trust for the daughter, Kamalinni until she is 21 years old and in the meantime the rent is to be used to settle the loan. The dispute is over who should be the trustee. As the Shah Alam house is charged to Bank Negara it can only be held by the husband as trustee.

[35] As the regards the wife's remaining prayers, I would state the following:-

(a) Loss of income by wife of RM 191,125 being her loss by reason of her resignation as computer programmer from 1989 to July 2002, this prayer is unsustainable as there is no legal basis for such a claim;

(b) Refund of loan from wife's brother of RM50,000 this prayer is unsustainable as there is no legal basis for such a claim;

(c) Wife be given one of the two cars, it was also the evidence of Tunku Zaid (RW3) that as the allowance and the car is given to senior government officers it is not for the use of the wife and children and only meant for official use. Neither of the cars can be transferred as both are still under loan from Bank Negara and subject to their prior claim (hak milik kena tuntut).

[36] As to the wife's own assets, she confirms in her own evidence that she has the following in her name gifted to her by her father (which the husband is not claiming):

(a) a bungalow in Klang where she and the children are residing;

(b) Fixed deposit of RM250,000 from the proceeds of sale of a shophouse (see Q12 to Bundle R15);

(c) Proton Wira Aeroback.

[37] For these reasons, I would order the following:

(1) The marriage be dissolved on ground that the parties have lived apart for a continuous period of at least two years, ie since 23 February 1999 under s 54(1)(d). Decree Nisi made absolute immediately. On ground of adultery with party cited as prayed in the cross-petition of the respondent wife is dismissed with costs. Hence the respondent wife's claim for damages is also dismissed with costs.

(2) The document in green titled 'Itemised Loan Disbursed' by Dr Paramjothi Ponnampalam towards the basic maintenance and well-being of the children of the petitioner is hereby rejected and expunged for the following reasons:

(i) Dr Paramjothi Ponnampalam is the brother of the respondent wife;

(ii) Dr Paramjothi is seeking to advance evidence by way of a letter annexing all sorts of documents purporting to substantiate an alleged loan made by him to his sister;

(iii) Dr Paramjothi did not testify in the witness box;

(iv) Dr Paramjothi was also in court during the proceedings;

(v) The alleged documents were never tendered in court;

(vi) The alleged documents were never exchanged;

(vii) It is trite law under our Evidence Act 1950 that:

(a) all facts except the contents of documents may be proved by oral evidence (see s 59 of Evidence Act);

(b) Documentary evidence is admissible if the maker of the statement is called as a witness in the proceedings (see s 73A(l)(b) Evidence Act).

(3) Joint legal custody of the four children to the petitioner and the respondent. Daily care and control to the respondent wife. Since the four children have previously freely and willingly gone with the petitioner after having been interviewed by Mohd Raus J who made the order and the fact that the four children came willingly to the petitioner for over one year, I shall now order access to the petitioner on specific times as follows:

(a) Alternative weekends from 6pm Friday to 8pm on Sunday;

(b) First half of school term holidays;

(c) Eve of Deepavali till 8pm. Deepavali day in alternate years;

(d) Alternate public holidays;

(e) Special occasions eg birthdays of the children (in alternate years), husband's birthday, wedding, etc;

(f) Daily telephone access; total time one hour.

(4) In the special circumstances of this case the petitioner is to maintain the four children at 25% of his nett income RM4,601.64 which amount to RM1,150.41, however since the petitioner volunteer to give RM2,500 per month I will still order accordingly plus paying normal education, medical and dental expenses to be paid forthwith on production of official receipts.

(5) The Shah Alam house held under HS(D) No Lot 0015124 Daerah Petaling, Mukim Damansara is to be held by the petitioner on trust for the daughter Kamalinni until the loan is fully repaid and it is hereby ordered the rent received shall be utilised to settle the said loan sum and once fully repaid and settled the said house is to be held by the petitioner and the respondent on trust for the said daughter until she attains the age of 21 years.

(6) The return of the children's money is dismissed.

Order accordingly.

Reported by Peter Ling